IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 145 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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HAMIDBHAI AZAMBHAI MALIK

Versus

STATE OF GUJARAT

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Appearance:

MR EE SAIYED for Appellant

MR KP RAVAL, APP for Respondent No. 1

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CORAM : MR.JUSTICE J.N.BHATT

and

MR.JUSTICE J.R.VORA

Date of decision: 31/07/2000

ORAL JUDGEMENT : [Per: Bhatt, J.]

By this Appeal under Section 374 of the Code of Criminal Procedure, 1973 (Code), the appellant - original accused has questioned the legality and validity of the conviction and sentence order recorded against him in Session Case No. 84 of 1996, by learned Addl. Sessions Judge, Bharuch, holding him guilty under Section 20 (b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985, for having committed the offence under Section 8(c) of the NDPS Act, and ordered to undergo minimum sentence of rigorous imprisonment for 10 years and a fine of Rs. 1 lac, and in default, simple imprisonment for one year, by passing the impugned judgment and order, on 7.2.1997.

The resume of material facts leading to filing of the present Appeal, may be stated at the outset.

The appellant, who is the original accused in Session Case No.84 of 1996, was charged for having committed offence punishable under Section 20(b)(ii) of the NDPS Act, on the basis of a complaint lodged by one PSI KD Pandya, LCB Branch, Bharuch District. Complainant in course of investigation of one another offence, registered vide CR No. II 135 of 1995, under the NDPS Act, came to know that, accused is, also, possessing and selling the contraband articles at his residence. Upon such information he and other officers started for raid.

Initially, he informed about having received such information to the higher officers, namely D.S.P. and Circle Inspector of Bharuch District, by writing a report in a sealed envelope, and sent it through one Police Constable.

On the basis of the said report, entry came to be recorded in Jambusar Police Station Diary at Sl.No. 17 of 1995 at about, 2.30 p.m., the raid was effected on 15.12.1995 after calling panchas and other officers and a photographer, and after undergoing other exercise required under the Rules.

The raiding party led by Mr. Pandya, PSI, went to the residence of accused, bearing Bharuch Municipal House No. 3132. The door of the house was open, and one person standing there was questioned, who replied that his name was Hamidbhai Azambhai Malik, the accused and the appellant before us. After introducing himself, he prepared a memorandum under Section 42, to the effect as to whether, accused would like is house to be searched in

presence of an Executive Magistrate or a Gazetted Officer, to which, accused replied in the negative. Since, accused had no objection, before starting search, PSI Pandya, took the signature of the accused on the memorandum, produced at Exh. 29.

Thereafter, the house was searched in presence of panchas, and a ladies purse containing 17 closed plastic small bags were found out, containing small tablets. Out of 17, the 16 small plastic bags contained the same weight. Plastic bags were opened and verified and weighed in presence of panchas, photographs were taken and again they were placed in the plastic bags. It was apprehended that on account of the unpleasant odour and smell, it seemed to be contraband articles like `Charas'.

The necessary procedure for seizure was undertaken and after the procedure was followed, the seal of LCB Branch, Bharuch was applied on the cover. The total weight of the contraband article, like charas came to 4.900 mgs. The sealed mudammal contraband articles charas thereafter was forwarded to the Director of Forensic Science Laboratory, for examination and report, who upon examination reported, it to be falling within the prohibited and contraband article under the NDPS Act `Charas'. The FSL authority had, also, verified the seal and it tallied with the forwarding letter and the item sent. Upon the basis of the report, the accused came to be charged as stated above.

In support of the prosecution case, the prosecution placed reliance on as many as 9 prosecution witnesses and also on 21 documentary evidence, to which, reliance may be made at appropriate stage hereinafter, as and when required. The defence of the accused was of total denial. No defence evidence was led. Upon the analysis and appraisal of the evidence of the prosecution, the learned Addl. Sessions Judge found accused guilty for having committed an offence punishable under Section 20(b)(ii) of the NDPS Act, and after hearing on the quantum of sentence, awarded minimum sentence prescribed i.e. 10 years rigorous imprisonment and a minimum fine of Rs. 1 lac, and in default, to undergo further simple imprisonment of one year more. That the impugned judgment and order was recorded on 7th February,1997, which is directly under challenge in this Appeal before this court

We have extensively heard learned Advocate for the appellant and the learned Addl. Public Prosecutor, and we have dispassionately examined the testimonials

collection and the documentary evidence, relied on by the prosecution.

The learned Advocate for the original accused - appellant contended before us that the prosecution has failed to establish the guilt of the accused under Section 8(c) of the NDPS Act beyond reasonable doubt, in view of the conflicting evidence and non-support of panchas. He also submitted that the material requirements of the provision of Section 42 and Section 50 of the NDPS Act, are not complied with and, therefore, the impugned judgment and order is vitiated for non-observance of mandatory provisions. He also contended before us that the prosecution has not successfully established that the contraband article, weighing less than 5 grams and found allegedly from the house of the accused, was the same, which was examined and analysed by the Director of Forensic Science Laboratory, as on the same day, four other cases were registered, and the mudammal articles are not proved be the same, as that of recovered or seized from the custody of the accused.

Learned Addl. Public Prosecutor while supporting the impugned judgment and order, reinforced and countenanced the aforesaid submissions and contended that the prosecution has, successfully, established that accused has committed breach of the provision of Section 8(c) of the NDPS Act. He, also, submitted that, this is nothing but it is a case of pure and simple sale and unauthorised use of contraband article under the NDPS Act, as 17 small plastic bags were found sealed and concealed, in the ladies purse in the house of the accused. It was, therefore, submitted by him that the conviction under Sec. 20(b)(ii) and resultant minimum sentence, deserves to be affirmed while dismissing the Appeal.

In so far as, the contentions raised by learned Advocate for the accused are concerned, after having considered the entire evidence of the prosecution threadbare, and critically analysing the impugned judgment and order, we are of the clean opinion that the present appeal is meritless, and the impugned judgment and order deserves to confirmed, as the guilt of the accused person is established beyond reasonable doubt under Section 20(b)(ii) of the NDPS Act.

The prosecution has, successfully, established from the evidence on record that the house which was searched and from where the mudammal contraband `charas' in 17 small plastic bags contained in ladies purse was found from the house in the possession of the accused. Raiding party

was reached at the venue i.e. the house of the accused, he was found at the door, which was open, and on being questioned, as to who the accused was by name, he gave his name and, therefore, raiding party entered into the house and found the contraband article. The contention that the house did not belong to the accused, is,rightly, rejected by the trial court. The prosecution has successfully established that the Bharuch Municipal No. 3132 bearing house was occupied and possessed of by the accused, and it was in the name of father of the accused in the property registered by the local authority of Bharuch Municipality, and the electric consumption bills were in the name of the wife of the accused. Three electric consumption bills produced at Exh. 39, 40 and 41, clearly support the prosecution case. Like wise, the Property Tax Entry and Bill at Exh. 20 of Bharuch Municipality stand in the name of the father of the accused. Therefore, the version of the prosecution and the evidence of the Police Officers that the place from where the contraband articles were found, was used and possessed of by the accused, and it was in his occupation, is, fully, reinforced by the documentary evidence and oral evidence of other witnesses. Therefore, the contention raised on behalf of the accused on this count, deserves to be rejected and accordingly it is rejected.

The contraband article `charas' which was seized, was sent to the Forensic Science Laboratory for examination and report, after observing necessary procedure, as prescribed in presence of panchas and police officers. This aspect is also fully borne out from the evidence of PSI K.D. Pandya, and also from the evidence of the prosecution witness No. 10. Uttambhai Dahyabhai at Exh.43, and also from the documentary evidence of the letter sent by Police to the Forensic Science Laboratory along with mudammal article on 20.2.1995. Therefore, the evidence of the prosecution and the Investigating Officer P.L. Bhagat, Dy.S.P., Amreli, at the relevant time, he was at Jambusar, is fully reinforced.

The evidence of photographer, who took several photographs, which are produced on record, after the raid was effected and the procedure was undertaken, which are produced at Exh.10 to 14. Accused is seen in the photographs and on being questioned, at one stage, he denied that he is not in the photographs, whereas on being questioned further, he has showed his ignorance without denying it. Apart from that, the evidence of members of raiding party and the photographer, clearly shows that the accused was found in the house at the

relevant time before the raid was effected and thereafter he was also found in the photographs.

Simply because two panchas, who have not supported the prosecution and who have obliged the accused, could not be said to be a factor, dynamiting the whole other reliable evidence emerging from the record of the present case. Of course, they have turned hostile. The law is also very clear that the evidence of hostile witnesses altogether cannot be rejected merely on the ground that they have not supported the prosecution case. If the intrisic worth of such an evidence is supporting other evidence, then in that case, it could also be seen and taken into account.

It was also submitted that the provision of Section 50 of the NDPS Act are not complied with. This submission is without any substance and it is rightly rejected by the trial court. Section 50 undoubtedly is a mandatory section and the conditions under which search of a person shall be conducted, ought to be established. However, it may be noted that in the present case, there is no question of finding out any contraband article or search of any individual, or search of person of the present accused. Section 50 is, therefore, not at all attracted to the facts of the present case. What is found is contraband articles, from the residential house of the accused. Therefore, the submission that the mandatory provision of Section 50 of the Act is not observed and, therefore, benefit should go to the accused, is required to be rejected straight away. Again, it may be noted that even if it is required to be applied, then also, the necessary procedure required to be performed by the Investigating Officer before effecting the search of a person as contemplated under Section 50, has been complied with. It appears that the Investigating Officer before starting the raid, in anticipation of any find of contraband article from the person of the accused, questioned him as to whether he would like to be searched in presence of a Gazetted Officer or an Executive Magistrate, to which accused denied and at the relevant point of time, a warrant was prepared, which is produced at Exh.29. It is seen by the accused. It is not denied. So, on both the counts, the provisions of Section 50 is not at all attracted. Therefore, the contention that there was non compliance of the provision of Section 50 must be rejected and accordingly, it is rejected.

It was also contended that the provision of Section 42 of the NDPS Act are not complied with and, therefore, the benefit should be accorded to the accused. This

submission is also, totally, meritless and deserves to be rejected in view of the statutory provision incorporated under Section 42 and the factual scenario emerging from the record of the present case. The provision of Section 42 would be attracted only when a person is to be searched by the Investigating Officer or the members of the raiding party.

In Chapter-V, the procedure for search and seizure and arrest has been statutorily prescribed. Section 41 of Chapter-V provides power to issue warrant and authorisation, which is not pressed into service. Section 42 of the NDPS Act pertains to the power of entry, search, seizure and arrest without warrant or authorisation, whereas Section 43 provides power of seizure and arrest in public places, Section 44 to 49 are not material so far as the merits of the present case are concerned and, therefore, they are not required to be examined. Section 50 of the NDPS Act is dealt with in the preceding paragraph. The search was made by the raiding party at about 4.30 p.m. on 15.12.1995. Section 42 will be invocable only if the search is made by the Police Officer or the concerned authority, upon the prior information. If such a person has reason to believe from personal knowledge or information given by any person and obliged to take down in writing as such the information about the accused having possessed of and dealing with contraband article like `charas' came to be appraised of by the concerned PSI Mr.K.D. Pandya, LCB Branch of Bharuch Police Station, in course of his investigation of an offence, registered vide CR No. II-135 of 1995. Therefore, it is settled proposition of law when such an information or intimation or knowledge comes to the notice of the Investigating Officer in course of the regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases the conditions incorporated in Section 42. Therefore, on that count, the contention raised on behalf of the appellant is required to be rejected and accordingly it is rejected.

However, it may also be noted that by way of abundant precaution, the PSI Mr.Pandya though he was investigating the offence registered with CR No. 135 of 1995 under the NDPS Act, upon receipt of an intimation or information about the present offence, also noted down such an information taken down in writing, which is produced at Exh.30, and such information was transmitted through a messenger immediately to the higher officers. Not only that this part of the procedure, by way of abundant precaution, exercised and followed by the PSI, is also

manifestly recorded in the complaint at Exh.32. So, on both the counts, the contention that non-compliance of Section 42 would vitiate the trial, is unacceptable.

After having considered the facts and circumstances emerging from the record of the present case and the detailed impugned judgment, we find that there is no substance in the appeal, which was faintly and probably half heartedly contended that the quantity of the contraband article was less than 5 grams and, therefore, benefit should also be granted to the accused, who is aged and is undergoing sentence since more than 5 years. After having failed to appeal to the head , a faint attempt came to be made to appeal to our heart. Be as it may, after having successfully found by the court that the contraband article was prohibited item under the NDPS Act, came to be seized and found from the custody of the accused, the presumption of culpable mental state has to be raised, but presumption has also to be made about the possession of illegal contraband article. Section 35 may be noted at this stage, which provides that in any prosecution for an offence under the NDPS Act, which requires a culpable mental state of the accused, it is mandatory for the court shall presume about the existence of such mental state, but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in the prosecution. Obviously, culpable mental state as explained in this section includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. No evidence is led by the defence, no material is successfully shown from the record of the trial court, which would even remotely rebut the presumption of Section 35. Again, sub-sec. (2) of Section 35 makes it clear that for the purpose of Sec. 35, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability. That the presumption of mental culpability under Section 35 can be rebutted by leading evidence or showing from the evidence on record with the same decree of proof, as that of, required to be proved by the prosecution under the Criminal jurisprudence.

Section 54 provides presumption from possession of illicit articles found from the accused. It is statutorily prescribed under Section 54 that in trials under the NDPS Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under Chapter IV in respect of -

(a) any narcotic drug or psychotropic substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of untensils specially adopted for the manufacture of any narcotic drug or psychotropic substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance, or any residue left of the materials from which any narcotic drug or psychotropic substance has been manufactured.

The court cannot oblivious to the statutory presumptions and trial court has rightly believed the case of prosecution, while rejecting the defence version, which is of total denial. In our opinion, the prosecution has successfully established that the appellant before us, original accused is guilty of offence punishable under Section 8(c), in resultant, he is liable to be sentenced under Section 20(b)(i) of the NDPS Act. After considering the peculiar facts and circumstances attributable to the accused borne out from the provisions of Section 313 of the Criminal Procedure Code, the trial court has taken a lenient view, and has imposed only minimum quantum of sentence and minimum fine. Therefore, in our opinion, the judgment and order of the trial court has remained totally unassailable.

In the result, the Appeal is required to be dismissed, and accordingly it is dismissed.

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p.n.nair